72-553 FILE COPY

No.

72-553

In the

Supreme Court of the United States

OCTOBER TERM, 1972

IN RE TERRELL SCHWARZ,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

JEROME H. TORSHEN
ROBERT A. SKIRNICK
11 S. LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

JEROME H. TORSHEN, LTD.
11 S. LaSalle Street
Chicago, Illinois 60603
(312) 372-9282

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 9

I. The Decision Below Conflicts With Decisions Of This Court On The Applicability Of The Privilege Against Self-Incrimination 9

A. The Court Below Held That The Privilege Against Self-Incrimination Does Not Extend To Disbarment Proceedings 9

B. The Court Below Held Petitioner's Fifth Amendment Rights Were Not Violated Because He Was Not Criminally Prosecuted .. 11

II. The Decision Below Denies Petitioner His Privilege Against Self-Incrimination, Renders Unconstitutional The Statute Under Which Immunity Was Granted And Conflicts With Decisions Of This Court On The Scope Of A Grant Of Immunity 15

III. The Decision Below Permits The Use Of Coerced Testimony To Impose A Penalty In Conflict With Decisions Of This Court 19

Appendix:

Opinion of the Supreme Court of Illinois 1a

Order Denying Petition for Rehearing 4a

PAGE

Table of Cases

In Re Ahearn, 23 Ill. 2d 69, 74 (1961) 14

Boyd v. United States, 116 U.S. 616 (1886) 10, 12, 20

Counselman v. Hitchcock, 142 U.S. 547 (1892) 17

In Re Damisch, 38 Ill. 2d 195, 230 N.E. 2d 254 (1967) 14

District of Columbia v. $45,897.70, (D.C. Super.Ct., 9/20/71) 10 Cr.L. 2021 (10/13/71) 18

In Re Donaghy, 402 Ill. 120 (1949) 14

Emspak v. U. S., 349 U.S. 190 (1955) 10

In re Gault, 387 U.S. 1 (1967) 10, 12

In Re Grand Jury Investigation of Giancana, 352 F. 2d 921 (7th Cir. 1965) 21

Griffin v. California, 380 U.S. 609 (1965) 20

Grosso v. United States, 390 U.S. 62 (1968) 13

In Re Hallman, 384 Ill. 325 (1943) 14

Kastigar v. United States, 406 U.S. 441 (1972) 9, 16, 17, 19

Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) 19

In re Lytton, 48 Ill. 2d 390, 270 N.E. 2d 32, 33 (1971) 15

Malloy v. Hogan, 378 U.S. 1 (1964) 17, 20, 22

Marchetti v. U. S., 390 U.S. 39 (1968) 13

McCarthy v. Arndstein, 266 U.S. 34 (1924) 10

Murphy v. Waterfront Comm., 378 U.S. 52 (1964) 16, 17, 19

Palko v. Connecticut, 302 U.S. 319 (1937) 21

People v. Hammond, 35 Ill. 581 (1935) 14

PAGE

People v. Johnson, 332 Ill. 84 (1928) 14

People v. McCaskrin, 325 Ill. 149 (1927) 14

People v. Rockola, 346 Ill. 27 (1931) 21

In Re Power, 407 Ill. 525, 531 (1950) 14

Quinn v. U. S., 349 U.S. 155 (1955) 10

Rochin v. California, 342 U.S. 165 (1952) 21

Re Ruffalo, 390 U.S. 544 (1968) 13, 19

In Re Serritella, 5 Ill. 2d 392, 397 (1955) 14

In Re Shavin, 40 Ill. 2d 254 (1968) 14

Shillitani v. United States, 384 U.S. 364 (1966) 21

Spevack v. Klein, 385 U.S. 511 (1967) .....
.....9, 10, 11, 18, 19, 22

In Re Sullivan, 33 Ill. 2d 548 (1966) 14

United States v. Doe, 405 F.2d 436 (2d Cir. 1968) 21, 22

United States v. Saline Bank, 26 U.S. (1 Peters) 100 (1828) 10

United States v. U. S. Coin & Currency, 401 U.S. 715 (1971) 12, 13

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V 2

United States Constitution, Amendment XIV, Section 1 3

Chapter 38, Illinois Revised Statutes, § 106-1 .....3, 4, 5, 20

Chapter 38, Illinois Revised Statutes, § 106-2 3

Chapter 38, Illinois Revised Statutes, § 106-3 .....3, 20

MISCELLANEOUS

The Supreme Court Review (1967) 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

IN RE TERRELL SCHWARZ,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Terrell Schwarz, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Illinois entered in this proceeding on March 21, 1972, and the order of said Court denying Petitioner's Petition for Rehearing dated May 25, 1972.

OPINION BELOW

The decision of the Supreme Court of the State of Illinois, Docket No. 43796 (1971) (51 Ill. 2d 334 (1972)) and the order of the Supreme Court of the State of Illinois denying the Petition for Rehearing appear in the Appendix.

JURISDICTION

A judgment of the Supreme Court of the State of Illinois was entered on March 21, 1972. A timely Petition for Rehearing was denied on May 25, 1972. This Petition for a Writ of Certiorari is timely filed pursuant to an order entered by Associate Justice William H. Rehnquist on August 18, 1972 extending the time for filing to and including October 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination applies in proceedings to disbar an attorney.

2. Whether a grant of transactional immunity to a witness enables the State to use the coerced testimony to inflict a penalty on such witness without violating said witness' privilege against self-incrimination.

3. Whether one arm of a State court system (to wit; a trial court) may compel or coerce testimony from a witness through a grant of transactional immunity and another arm of a State court system (to wit; the Supreme Court) use only the coerced testimony to disbar such witness without violating his right to due process and his privilege against self-incrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

UNITED STATES CONSTITUTION, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 38 of the ILLINOIS REVISED STATUTES:

> § 106-1. *Granting of Immunity.* In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> § 106-2. *Effect of Immunity.* Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.
>
> § 106-3. *Refusal to Testify.* Any witness who having been granted immunity refuses to testify or produce other evidence shall be in contempt of court subject to proceedings in accordance to law.

STATEMENT OF THE CASE

Petitioner Schwarz was disbarred by the Supreme Court of Illinois solely on the basis of coerced testimony given by him while under a grant of transactional immunity.

Chapter 38, §106-1 of the Illinois Revised Statutes (S.H.A. Chap. 38, §106-1) provides:

> "Granting of Immunity.
> In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability *to be prosecuted or punished* on

account of any testimony or other evidence he may be required to produce." (Emphasis added.)

On April 14, 1969, a subpoena was issued by the Clerk of the Circuit Court of Cook County commanding Schwarz to appear to testify before The Honorable Frank J. Wilson in the Circuit Court of Cook County, in Case No. 67-3642 entitled, *The People of the State of Illinois* v. *Louis W. Kizas.* (R. 11)

On April 16, 1969, The People of the State of Illinois, by Edward V. Hanrahan, State's Attorney of Cook County, moved in the Circuit Court of Cook County, County Department, Criminal Division, in *People of the State of Illinois* v. *Louis Kizas,* Indictment No. 67-3642, for an order granting immunity to Schwarz under the aforecited statute (S.H.A., Ch. 38, § 106-1) and prayed for an order releasing Schwarz from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, in the trial of said case. (R. 11-12)

On April 16, 1969, an order was entered pursuant to the aforesaid motion by The Honorable Frank J. Wilson, Judge of the Criminal Court of Cook County, finding that the testimony of Schwarz would tend to incriminate him and releasing Schwarz "from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, in the trial of People v. Louis W. Kizas. . . ." (R. 12) Said order provided, *inter alia* (R. 44):

This matter coming on to be heard on Motion by Edward V. Hanrahan, State's Attorney in and for

the County of Cook and his Assistant, Thomas A. Hett, to grant immunity from prosecution as provided by Chapter 38, Article 106, Illinois Revised Statutes 1967, to Terrell Schwarz in People v. Louis W. Kizas, Indictment No. 67-3642, now on trial before this Court:

The Court being fully advised in the premises doth find:

1. That Terrell Schwarz is a material witness in the above indicated matter being heard by this Court.
2. That the testimony of said Terrell Schwarz would tend to incriminate him.
3. That Terrell Schwarz has been subpoenaed as a witness in connection with the indicated matter by the People of the State of Illinois.

Therefore, the Motion herein is allowed and Terrell Schwarz is hereby released from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, in the trial of People v. Louis W. Kizas, Indictment 67-3642, now being heard by this Court.

Thereafter, on April 16, 1969, Schwarz appeared in the Circuit Court of Cook County, Criminal Division, before The Honorable Frank J. Wilson in the *Kizas* case and testified under oath as follows (R. 12, 38-40):

"Q. [by the Assistant State's Attorney] And where did you go?

"A. [by Schwarz] To the parking lot immediately adjacent to our respective automobiles.

"Q. And what if anything occurred at that time in the parking lot?

"A. In the parking lot I engaged in some conversation with Judge Kizas to the effect of thanking him for coming out, and I shook hands with him.

"Q. All right. Prior to your shaking hands with him, what if anything did you do?

"A. I had folded five $10 bills into a small wad in my palm.

"Q. You say your palm, the palm of which hand?

"A. My right hand.

"Q. And then what did you do?

"A. Then I shook hands with Judge Kizas.

"Q. Did you shake hands with your right hand?

"A. Yes, sir.

"Q. Which hand did he use to shake hands with you?

"A. His right hand.

"Q. All right. After you shook hands, did you withdraw your hand?

"A. Yes, sir.

"Q. Was anything left in your hand?

"A. No, sir.

"Q. What did Judge Kizas do with his right hand?

"A. Put it into his pocket.

• • •

"Q. Did Judge Louis Kizas take the five $10 bills that you had folded in your right hand when you shook hands with him?

"A. Yes, sir.

"Q. And he then put that hand in his pocket?

"A. Yes, sir.

"Q. Now, was this the first and only time that you personally ever gave Judge Kizas money after he had come out and set a judicial bond for you?

"A. No, sir.

"Q. Did it happen more than once before?

"A. Yes, sir.

"Q. Did it happen more than twice before?

"A. Yes, sir.

"Q. Did it hapen more than three times before?
"A. I'm sure.
"Q. Did it happen more than five times before?
"A. Probably.
"Q. Could it have happened more than 10 times before?
"A. What was your question, could it have?
"Q. That's right.
"A. Yes, sir.
"Q. Could it have happened more than 10 times?
"A. I honestly can't answer, it might have, it might not.
"Q. To your own knowledge, were you the only person that ever paid Judge Kizas money after he had come out and set a judicial bond?

• • •

"A. No, sir."

Thereafter, the Committee on Inquiry of the Chicago Bar Association, acting as Commissioners of the Supreme Court of Illinois, filed a complaint against Schwarz charging that he had been guilty of conduct and practices which tend to bring the legal profession into disrepute. The only specific charge made against Schwarz was:

> "That on April 15, 1969, said Terrell Schwarz appeared in the Circuit Court of Cook County, Criminal Division, before The Honorable Frank J. Wilson and testified under oath, that he did, on one particular occasion, to-wit: October 7, 1966, paid the sum of $50.00 to said Louis Kizas to perform a judicial act of setting bond and that he did on as many as five other occasions pay to the aforesaid then associate circuit court judge monies to obtain bond." (R. 6-8, 12-13)

Schwarz moved to dismiss the complaint, (R. 10-14) which motion was denied (R. 61) and thereafter "without

in any way waiving or modifying the position . . . expressed before the Committee on Grievances [of the Chicago Bar Association (*acting as duly appointed Commissioners of the Supreme Court of Illinois*)] that the proceedings herein are neither proper nor valid and that he [Schwarz] is protected against these proceedings by release from all liability to be prosecuted or punished" made answer to the complaint. (R. 16) Over objection by Schwarz, evidence was presented to a Division of the Committee on Grievances of the Chicago Bar Association sitting as Commissioners of the Supreme Court of Illinois which consisted solely of the transcript of Schwarz' testimony above quoted and the documentary evidence hereinabove referred to. (R. 52-78) Motions to dismiss at the close of the evidence against Schwarz were denied. (R. 19, 73)

The Division of the Committee on Grievances found, based upon the foregoing evidence, that Schwarz' conduct brought the legal profession into disrepute and recommended that Schwarz be disbarred from the practice of law. This finding and recommendation were approved by the entire Committee on Grievances and the Board of Managers of the Chicago Bar Association, each group sitting as Commissioners of the Supreme Court of Illinois. (R. 34, 46, 49)

The report and recommendation of the Commissioners was approved by the Supreme Court of Illinois and petitioner was ordered disbarred. (App. p. 4a)

Proper constitutional objections were made at all stages of the grievance proceedings and before the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT.

Introduction.

Petitioner, by an order of the Circuit Court of Cook County, Illinois, granting immunity from "prosecution or punishment", was compelled to give testimony at a criminal trial. The Supreme Court of Illinois then disbarred petitioner, relying solely upon the testimony coerced from him. Such use of petitioner's coerced testimony to prosecute and punish him is not consonant with due process standards.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE APPLICABILITY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Court Below Held That The Privilege Against Self Incrimination Does Not Extend To Disbarment Proceedings.

Petitioner contended in the Court below that the privilege against self-incrimination is applicable to disbarment proceedings. The Illinois Supreme Court rejected this contention and held that the privilege against self-incrimination does not apply in a disbarment proceeding (App. p. 4a).

The holding of the Court below conflicts with the express holdings of this Court in numerous cases, is in direct conflict with this Court's holding in *Spevack* v. *Klein*, 385 U.S. 511 (1967) and ignores the history, purpose and thrust of the privilege against self-incrimination.

The applicability of the privilege against self-incrimination was recently reviewed in *Kastigar* v. *United States*, 406 U.S. 441 (1972) where this Court stated:

> "It [the privilege] can be asserted in *any proceeding*, civil or criminal, administrative or judicial, investigatory or adjudicatory. . . ." (Id. at 444; emphasis added.)

This statement of the applicability of the privilege broke no new ground. This Court has long held the privilege to be available in any type of proceeding. In *United States* v. *Saline Bank*, 26 U.S. (1 Peters) 100 (1828), a civil case, Mr. Chief Justice Marshall held that: "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." (Id. at 104). Similarly, in *Boyd* v. *United States*, 116 U.S. 616 (1886), the privilege was held applicable in a civil forfeiture proceeding. The application of the privilege in an examination of a bankrupt before a special commissioner for examination of assets was considered in *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924). Mr. Justice Brandeis stated:

> "The Government insists broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings. . . ." (Id. at 40).

This Court has held that the privilege may be asserted in proceedings before legislative committees, *Quinn* v. *U.S.*, 349 U.S. 155 (1955); *Emspak* v. *U.S.*, 349 U.S. 190 (1955), as well as in juvenile proceedings, *In re Gault*, 387 U.S. 1 (1967).

Finally, in *Spevack* v. *Klein*, *supra*, at 514, where petitioner was disbarred from the practice of law for invoking

his privilege against self-incrimination in a disciplinary proceeding, this Court held:

> ". . . that the Self-Incrimination clause of the Fifth Amendment has been absorbed in the Fourteenth, [and] that it extends its protection to lawyers as well as to other individuals. . . ."

This Court said:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. . . . [L]awyers also enjoy first-class citizenship." (Id. at 516).

In direct conflict with the above-quoted holding of *Spevack* v. *Klein*, as well as the other cited cases, the Illinois Supreme Court has found room in the privilege against self-incrimination for classifications of people; that room violates the constitutional rights of petitioner and of every lawyer in the State of Illinois.

B. The Court Below Held Petitioner's Fifth Amendment Rights Were Not Violated Because He Was Not Criminally Prosecuted.

The Illinois Supreme Court ordered petitioner disbarred solely on the basis of his coerced testimony and held:

> "The respondent has not been prosecuted criminally by reason of his testimony, and his fifth amendment rights have not been violated." (App. p. 4a)

This narrow view of the privilege against self-incrimination is without support in the decisions of this Court. Neither a criminal prosecution nor the possibility of a criminal prosecution is a requisite antecedent to a violation of Fifth Amendment rights. This Court has consistently held that the nature of the proceeding is irrelevant

to a consideration of whether Fifth Amendment rights may be asserted. In proceedings which are not called criminal, the determinative factor is the nature of the sanction which the Government can impose.

As this Court stated in *In re Gault*, 387 U.S. 1, 49 (1967):

> ". . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."

Thus, in *Gault*, this Court looked to the nature of the sanction which the Government could impose in the non-criminal juvenile proceedings, namely commitment, and held the privilege against self-incrimination applicable. Although there was no criminal prosecution, the petitioner's Fifth Amendment rights had been violated.

Likewise, in *Boyd* v. *United States*, 116 U.S. 616 (1886), where the action was a civil forfeiture against property under a statute which offered the owner an election between producing a document or forfeiting the goods at issue, this Court looked to the nature of the sanction which the Government could impose and held the Fifth Amendment applicable.

In *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971), following the conviction of one Angelini for failing to register as a gambler and to pay the related gambling tax, the Government instituted civil forfeiture proceedings to obtain money which Angelini had in his possession at the time of his arrest. This Court again looked to the nature of the sanction the Government sought to impose and held the Fifth Amendment applicable, notwithstanding the fact that Angelini had already been crim-

inally convicted. Based on statements in the opinions in *Marchetti* v. *U.S.*, 390 U.S. 39 (1968) and in *Grosso* v. *United States*, 390 U.S. 62 (1968) that the Government remained free to collect taxes due under the gambling tax statute so long as it did not attempt to punish the taxpayer for his failure to file required documents, this Court said in *U.S.* v. *U.S. Coin & Currency, supra* at 718:

> "The Government now relies heavily on the fact that *Marchetti* and *Grosso* only held that 'a claim of privilege precludes a *criminal conviction* premised on failure to pay the tax.' (Emphasis in original.) It argues that just as it may collect taxes in a civil action, the Government may also initiate forfeiture proceedings—which are also formally civil in nature—without offending *Marchetti* and *Grosso*. But as *Boyd* v. *United States*, 116 U.S. 616, 634 (1886) makes clear, 'proceedings instituted for the purpose of declaring the forefeiture of a man's property *by reason of offenses committed by him*, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes. (Emphasis in original.)

Likewise, in the instant case, the State of Illinois instituted proceedings against and imposed the extreme penalty of disbarment upon petitioner by reason of offenses committed by him. For Fifth Amendment purposes, proceedings in which such extreme sanctions may be imposed must be regarded as criminal.

Disbarment is a punishment or a penalty. As this Court held in *Re Ruffalo*, 390 U.S. 544 (1968):

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall 333, 380, 18 L.Ed. 366, 369; Spevack v. Klein, 385 U.S. 511, 516, 17 L.Ed. 574, 577, 87 S.Ct. 625. . . . These are adversary proceedings of a quasi-criminal nature." (390 U.S. at 550-551)

Indeed, the Illinois Supreme Court has consistently held that disciplinary proceedings and disbarment are punishment. See *In Re Damisch,* 38 Ill.2d 195, 230, N.E.2d 254, 261-62 (1967) ("*punishment* . . . imposed . . . is censure"); *In Re Shavin,* 40 Ill.2d 254, 239 N.E.2d 790 (1968) ("Sole question presented . . . is the extent of the *punishment* to be imposed"); *In Re Sullivan,* 33 Ill.2d 548, 213 N.E.2d 257, 260 (1966) ("this court has final responsibility for determining the *punishment* to be imposed. . ."); *People* v. *McCaskrin,* 325 Ill. 149, 163 (1927) ("The *punishment* to be inflicted by disbarment of an attorney is the destruction of his professional life."); *In Re Hallman,* 384 Ill. 325, 332 (1943) (. . . to justify the infliction of the heavy *punishment* of disbarment the case must be clear and free from doubt . . . and to warrant the extreme *punishment* of disbarment clear and satisfactory proof is required. . . [the commissioners] were influenced in the recommendation as to the *punishment* to be inflicted. . .); *In Re Serritella,* 5 Ill.2d 392, 397 (1955) (". . . implication of *punishment* by this court.); *In Re Donaghy,* 402 Ill. 120, 124 (1949) ("The courts . . . should not hesitate to inflict the penalty where the *punishment* [of disbarment or suspension] is fully deserved" . . . The *punishment* to be inflicted by disbarment of an attorney is the destruction of his professional life.); *People* v. *Hammond,* 35 Ill. 581, 583 (1934) (. . . the attorney guilty of such misconduct would deserve *punishment.* . . ."); *People* v. *Johnson,* 332 Ill. 84, 88 (1928) ("The *punishment* to be inflicted by disbarment of an attorney is the destruction of his professional life."); *In Re Power,* 407 Ill. 525, 531 (1950) (". . . sufficient *punishment* would be suspension."); *In Re Ahearn,* 23 Ill.2d 69, 74 (1961) ("suspension is a proper *punishment*" and "censure is sufficient *punishment*").

In Illinois, disbarment is a punishment which can be imposed after conviction of a crime. As the Illinois Supreme Court held in *In re Lytton*, 48 Ill.2d 390, 270 N.E. 2d 32, 33 (1971):

> "It is well established that conviction of a crime involving moral turpitude is conclusive evidence of an attorney's guilt and is ground for disbarment or other disciplinary action. (Citing cases.)

In the instant disciplinary proceeding the only question presented by the State was whether petitioner had engaged in criminal conduct. Nevertheless, the State denied petitioner his privilege against self-incrimination and coerced concededly incriminating testimony. Petitioner was then punished as if he had committed a criminal act but was not accorded the constitutional rights attendant upon a criminal prosecution.

II. THE DECISION BELOW DENIES PETITIONER HIS PRIVILEGE AGAINST SELF-INCRIMINATION, RENDERS UNCONSTITUTIONAL THE STATUTE UNDER WHICH IMMUNITY WAS GRANTED AND CONFLICTS WITH DECISIONS OF THIS COURT ON THE SCOPE OF A GRANT OF IMMUNITY.

Petitioner Schwarz claimed his privilege against self-incrimination at the Grand Jury investigation and at the trial in which he was called as a witness. He was granted immunity in both instances and he testified in each under a grant of immunity. (R. 86-92) Petitioner was:

> ". . . released from all liability to be *prosecuted or punished on account of any transaction,* matter or thing concerning which he may be required to testify. . . ." (Emphasis added; R. 89, 92)

In short, petitioner was granted transactional immunity from prosecution or punishment as opposed to the narrower "use" immunity.

The scope of the grant of immunity as interpreted by the Court below denied petitioner his constitutional privilege against self-incrimination, rendered unconstitutional the statute under which the grant was made and created a conflict between decisions of this Court and that of the Court below.

In *Kastigar* v. *United States,* 406 U.S. 441 (1972), where the constitutionality of a "use" immunity statute and the relationship between a grant of immunity and the privilege against self-incrimination were considered, this Court stated that the sole concern of the privilege against self-incrimination "is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts."' Immunity from the use of compelled testimony as well as evidence derived directly and indirectly therefrom, affords this protection." (Id. at 453).

The scope of immunity granted petitioner, as interpreted by the Court below, did not afford him the protection guaranteed by the privilege against self-incrimination. Not only did the Court below deny petitioner transactional immunity, it used the compelled testimony, and only the compelled testimony, to inflict a penalty on him.

The test of whether a grant of immunity violates a witness' constitutional right against self-incrimination was set forth by this Court in *Murphy* v. *Waterfront Comm.,* 378 U.S. 52 (1964) and followed in *Kastigar, supra.* A con-

stitutional grant of immunity is one which "leaves the witness and the . . . Government in substantially the same positions as if the witness had claimed his privilege" in the absence of a grant of immunity (*Murphy, supra* at 79). The actions of the State of Illinois as to your petitioner do not meet this test.

After receiving a grant of immunity, petitioner Schwarz and the State of Illinois were *not* in substantially the same position as if petitioner had claimed his privilege. One arm of the Illinois court system granted petitioner transactional immunity and compelled testimony from him. Another arm of the Illinois court system used this compelled testimony and, solely on the basis of such testimony, inflicted a penalty on petitioner Schwarz; a penalty which is meted out for the commission of criminal acts.

The grant of immunity to petitioner was not, as required by this Court's decisions in *Kastigar, Murphy* and *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), coextensive with the scope of the privilege against self-incrimination and was therefore not constitutionally valid. If petitioner had been permitted to stand on his privilege against self-incrimination and had not been compelled to testify in the *Kizas* case, the State of Illinois would not have been able to inflict the harshest of available penalties —disbarment—on the basis of evidence out of petitioner's own mouth. As this Court stated in *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964):

> "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."

This constitutional compulsion was ignored by the State of Illinois.

The scope of a grant of immunity was questioned by Dean Robert B. McKay of the New York University School of Law in "Self-Incrimination and the New Privacy," 1967 *The Supreme Court Review* 193 et seq., when he asked ". . . whether sanctions such as . . . disbarment of a lawyer could be based on disclosures made after a grant of immunity. Surely these are 'costly' consequences of the claim of privilege and therefore should not be allowed. Is not this an almost inescapable reading of *Spevack*, at least concerning the disbarment question?" (Id. at 231.) The question is now before this Court.

The question of the scope of a transactional grant of immunity was before the Superior Court of the District of Columbia in *District of Columbia* v. *$45,897.70*, (D.C. Super.Ct., 9/20/71) 10 Cr.L. 2021 (10/13/71). There, after the District Court granted transactional immunity at the request of the U. S. Attorney, the Corporation Counsel instituted forfeiture proceedings against the money used in a lottery operation. The issue was whether the grant of immunity precluded the civil action. The Court held that the U. S. Attorney and the Corporation Counsel were "arms of the same sovereign" and that:

> "Since the two separate legal arms thus extend from the same body, one hand may not take away that which the other hand has caused to be given."

The Court concluded that the immunity grant was binding on the District of Columbia and that the seized money must be returned.

Similarly, the Supreme Court of Illinois may not constitutionally take away what the trial court in the instant

case gave to petitioner—immunity from prosecution or punishment "on account of any transaction, matter or thing concerning which he may be required to testify. . . ."

In construing the grant of immunity to petitioner, the Court below denied him his right against self-incrimination, construed the Illinois immunity statute in a manner which fails to make the grant of immunity coextensive with the right against self-incrimination and created a conflict with the decisions of this Court in *Kastigar* v. *U.S., supra* and *Murphy* v. *Waterfront Comm., supra.*

III. THE DECISION BELOW PERMITS THE USE OF COERCED TESTIMONY TO IMPOSE A PENALTY IN CONFLICT WITH DECISIONS OF THIS COURT.

The Fourteenth Amendment to the United States Constitution requires that "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." Petitioner was entitled to due process of law in the disbarment proceedings. *Re Ruffalo,* 390 U.S. 544, 514, 20 L.Ed. 2d 117, 122 (1968); *Spevak* v. *Klein,* 383 U.S. 511, 577, 17 L.Ed.2d 574, 577 (1967). In *Law Students Research Council* v. *Wadmond,* 401 U.S. 154 (1971), Mr. Justice Black (dissenting) stated:

> "[I]t must be remembered that the right of a lawyer . . . to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore I think that when a State seeks . . . to disbar a lawyer, it must proceed according to the most exacting demands of due process of law."

The only evidence in the record is testimony given under coercion by petitioner in the trial court. The State, itself, coerced Schwarz' testimony and the State, itself,

used this testimony against petitioner. Such conduct by a State offends that sense of fairness which is embodied in the concept of due process.

As this Court stated in *Boyd* v. *United States*, *supra* at 631-32:

> ". . . any compulsory discovery by extorting the party's oath . . . to convict him of a crime or to forfeit his property, is contrary to the principle of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but, it cannot abide the pure atmosphere of political liberty and personal freedom."

Prior to giving his testimony, Schwarz had a right secured by the due process clause of the Federal Constitution against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1, 3, 12 L.Ed.2d 653, 656 (1964); *Griffin* v. *California*, 380 U.S. 609, 611, 615, 14 L.Ed.2d 106, 108, 110 (1965). This right was taken from him by the State.

Schwarz' testimony was coerced by application of the witness immunity provisions of the Illinois Code of Criminal Procedure. Ill. Rev. Stat. 1969, ch. 38 §106-1, *et seq.* Upon the entry of the April 16, 1969 order of the Honorable Frank J. Wilson, Judge of the Criminal Court of Cook County, releasing Schwarz "from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, in the trial of People v. Louis W. Kizas . . .", the provisions of S.H.A. ch. 38 §106-3 became applicable:

> "Any witness who having been granted immunity refuses to testify or produce other evidence shall be in contempt of court subject to proceedings in accordance to law."

Had Schwarz remained silent, he would have been in contempt of court and subject to confinement and other punishment "to coerce him to answer questions" (352 F.2d at 925), Ill. Rev. Stat. 1969, ch. 38, §106-3; *People* v. *Rockola*, 346 Ill. 27 (1931); *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966)); *In Re Grand Jury Investigation of Giancana*, 352 F.2d 921, 922-23, 925 (7th Cir), *cert. denied*, 382 U.S. 939 (1965).

Use of coerced testimony by the State in the disbarment proceedings denied Schwarz due process as guaranteed to him by the Fourteenth Amendment. See *Rochin* v. *California*, 342 U.S. 165, 169, 172-73 (1952); *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937); *United States* v. *Doe*, 405 F.2d 436, 438 (2d Cir. 1968).

In *Rochin* v. *California*, 342 U.S. 165, 169, 172-73 (1952), it was held that:

> "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, or are 'implicit in the concept of ordered liberty.' *Palko* v. *Connecticut*, 302 U.S. 319, 325.
>
> • • •
>
> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional

> law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'
>
> ". . . Coerced confessions offend the community's sense of fair play and decency. . . ."

As this Court held in *Malloy* v. *Hogan*, 378 U.S. 1, 8, 12 L.Ed.2d 653, 659 (1964):

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

Petitioner's right to remain silent was taken from him.

In *United States* v. *Doe*, 405 F.2d 436, 438 (2d Cir. 1968), it was stated:

> "Even though evidence is not within a testimonial privilege, the due process clause protects against the use of excessive means to obtain it."

In the instant case, "excessive means", to wit, the coercion of the court, were used to obtain all of the evidence presented against Schwarz.

In *Spevack* v. *Klein*, 385 U.S. 511, 516, 17 L.Ed.2d 574, 578 (1967), this Court held that the privilege against self-incrimination was proper in any proceeding in which so severe a penalty as "loss of professional standing, pro-

fessional reputation and livelihood" is involved. However, petitioner was denied his right to the privilege by the State which compelled him to give testimony against himself. His constitutional privilege against self-incrimination was nullified when the State of Illinois whipsawed him into giving incriminating statements in one proceeding for use in another even though the privilege was available in both proceedings. This is certainly violative of due process standards and the American sense of fair play embodied therein.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Illinois.

Respectfully submitted,

JEROME H. TORSHEN
ROBERT A. SKIRNICK
11 S. LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

APPENDIX

Opinion of the Supreme Court of Illinois

Docket No. 43796—Agenda 35—November, 1971.

In re TERRELL SCHWARZ, Attorney, Respondent.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This matter is before the court upon the exceptions of the respondent, Terrell Schwarz, to the report and recommendation of the Committee on Grievances and Board of Managers of The Chicago Bar Association, sitting as Commissioners under Rule 751. (Ill.Rev.Stat. 1969, ch. 110A, par. 751.) The report recommended that the respondent be disbarred.

The respondent testified under subpoena in a criminal prosecution against one Louis Kizas, then an associate judge of the circuit court of Cook County. Before he testified an order was entered granting his immunity. (Ill.Rev.Stat. 1969, ch. 38, par. 106.) This disciplinary proceeding is based upon the testimony that he gave at that time, the important portion of which is as follows:

"Q. And what if anything occurred at that time in the parking lot?

A. In the parking lot I engaged in some conversation with Judge Kizas to the effect of thanking him for coming out, and I shook hands with him.

Q. All right. Prior to your shaking hands with him, what if anything did you do?

A. I had folded five $10 bills into a small wad in my palm.

Q. You say your palm, the palm of which hand?

A. My right hand.

Q. And then what did you do?

A. Then I shook hands with Judge Kizas.

Q. Did you shake hands with your right hand?
A. Yes, sir.
Q. Which hand did he use to shake hands with you?
A. His right hand.
Q. All right. After you shook hands, did you withdraw your hand?
A. Yes, sir.
Q. Was anything left in your hand?
A. No, sir.
Q. What did Judge Kizas do with his right hand?
A. Put it into his pocket.
Q. Did Judge Kizas take the $50 when you had it folded in your hand?
A. I didn't hear.
Q. Did Judge Louis Kizas take the five $10 bills that you had folded in your right hand when you shook hands with him?
A. Yes, sir.
Q. And he then put that hand in his pocket?
A. Yes, sir.
Q. Now was this the first and only time that you personally ever gave Judge Kizas money after he had come out and set a judicial bond for you?
A. No, sir.
Q. Did it happen more than once before?
A. Yes, sir."

The respondent argues that this testimony was insufficient to establish that he was guilty of conduct that brought the legal profession into disrepute and to support the recommendation for disbarment. He says that the record "fails to disclose improper motive by either Kizas or Schwarz, that Schwarz ever paid Kizas to perform judicial acts, that Kizas performed any judicial act at the instance of Schwarz, that Kizas performed any judicial act improperly or that Schwarz or his clients were the beneficiaries of wrongful acts by Kizas. The evidence merely shows, without more, that on several occasions, after Kizas set judicial bond, Schwarz gave him money."

We are unable to accept this argument. Motive and intent are rarely the subject of direct testimony; they must ordinarily be inferred from conduct and from the circumstances under which that conduct took place. (See, Wigmore on Evidence, sec. 242.) The respondent's own description of his surreptitious payments to Judge Kizas shows conduct that tends to defeat the administration of justice and to bring the courts and the legal profession into disrepute.

The respondent also contends that disciplinary action cannot be based upon the testimony which he gave at the trial of Judge Kizas because that testimony was given under a grant of immunity in accordance with article 106 of the Criminal Code. (Ill.Rev.Stat. 1969, ch. 38, art. 106.) Section 106—1 authorizes the entry of an order releasing a witness from "all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce." And because professional discipline of a lawyer has frequently been referred to as "punishment," the respondent argues that he cannot be subjected to discipline on account of his testimony.

Section 106—2, however, makes it clear that the effect of an immunity order is limited to criminal prosecutions and criminal punishments. It provides: "Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony." (Ill.Rev.Stat. 1969, ch. 38, par. 106—2.) That this is the correct interpretation of article 106 of the Code is clear from an examination of the predecessor provision, which included in a single sentence the substance of the three sections that now comprise article 106. (See Ill.Rev.Stat. 1961, ch. 38, par. 714.1.) Placing the provisions concerning the granting of immunity in one section (par. 106—1) and those concerning the effect of immunity when granted in another (par. 106—2) did not have the effect of expanding the word "punishment" to include anything beyond criminal sanctions.

It is argued, however, that unless article 106 is read to include immunity from professional discipline, the respondent's rights under the fifth amendment to the constitution of the United States will be violated. In support of this contention, respondent relies heavily upon *Spevack* v. *Klein* (1967), 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625. He contends that the holding of that case serves in a general way to make "the privilege against self-incrimination applicable to a disbarment proceeding." In our view this interpretation is much too broad. "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." (*Gardner* v. *Broderick* (1968), 392 U.S. 273, 276, 20 L.Ed.2d 1082, 1085, 88 S.Ct. 1913.) The respondent has not been prosecuted criminally by reason of his testimony, and his fifth amendment rights have not been violated.

The report and recommendation of the commissioners is approved and the respondent is disbarred.

Respondent disbarred.

Letterhead of The Supreme Court of Illinois
May 25, 1972

Mr. Jerome H. Torshen
Attorney at Law
11 So. LaSalle St.
Chicago, Ill. 60603

No. 4376—In re: Terrell Schwarz, an Attorney. Information.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court.

FILE COPY

NOV 3 1972

No. 72-[illegible]

In the

Supreme Court of the United States

October Term, 1972

IN RE TERRELL SCHWARZ,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

JOHN CADWALADER MEEK
29 South La Salle Street
Chicago, Illinois 60603

Hereinafter appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

La Salle Street Press—Chicago/Telephone/Code

INDEX

	Page
Opinion of the Court Below	1
Statement of the Case	1
Questions Presented	2
Reasons for Not Granting the Writ	2
Prefatory Statement	2
I. The Court Below Did Not Deprive Petitioner of Any Constitutional Rights and Its Decision is Consonant With The Decisions of This Court on Comparable Matters	2
II. There is No Constitutional Requirement That an Immunity Statute Afford Broader Protection Than That Provided By the Fifth Amendment	8
Conclusion	12

TABLE OF CASES

Page

In re Damisch, 38 Ill. 2d 195, 230 N.E. 2d 254 10

Gardener v. Broderick, 392 U.S. 273 (1967) 5

In Re Isserman, 345 U.S. 286-289 (1953) 11

Kastigar v. U.S., 406 U.S. 441 (1972) 4, 5, 8, 9

In the Matter of Napolitano, 401 U.S. 951 8

Napolitano v. Ward, 457 F. 2d 279 (7th Cir. Ill.) 7, 8

People v. Meyerovitz, 278 Ill. 356, 364 (1917) 9, 10

Reina vs. U. S., 364 U.S. 507 (1960) 11

In re Shavin, 239 N.E. 2d 790 7

In the Matter of Nathan Shavin, an Attorney, 393 U.S. 1019 7

Spevack v. Klein, 385 U.S. 511 (1967) 4, 6, 10

Ungar v. Association of the Bar of the City of New York 389 U.S. 1007, 18 N.Y. 2d 430, 282 N.Y.S. 2d 158 6, 7

Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 392 U.S. 287 6

Zuckerman vs. Greason, 20 N.Y. 2d 430, 231 N.E. 2d 718 (Ct. of App. 1967), cert. den. 390 U.S. 925 (1968) ... 7

Statutory Provisions

Chapter 38, Illinois Revised Statutes § 106-1 .....3, 10

Chapter 38, Illinois Revised Statutes § 106-2 .....3, 9, 10

In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-553

IN RE TERRELL SCHWARZ,

Petitioner,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois is published in the Illinois Supreme Court reports as 51 Ill. 2d 334, and in the North Eastern Reporter as 282 N.E. 2d 689. It also appears in the Appendix to Petitioner's Brief.

STATEMENT OF THE CASE

The Statement submitted by the Petitioner is sufficient for the presentation of the issues involved.

QUESTIONS PRESENTED

1. Is there an infringement of the Fifth Amendment privilege against self-incrimination where a lawyer has testified in criminal proceedings after a grant of immunity, and that testimony is thereafter used as basis of a professional disciplinary proceeding against him.

2. May a lawyer, when called to respond in disciplinary proceedings, be insulated from the consequences of his unethical conduct by reason of a grant of immunity from criminal prosecution conferred in exchange for his testimony in a criminal proceeding. Did the Supreme Court of Illinois act in an constitutionally impermissible manner when it disciplined Petitioner under these circumstances.

REASONS FOR NOT GRANTING THE WRIT

Prefatory Statement

It is respectfully suggested that the issues presented here are essentially narrow. Clearly, disciplinary proceedings against lawyers charged with unprofessional conduct must be conducted in accordance with substantive and procedural due process requirements; consequently, general discussions of these matters would appear to be of no assistance in directing attention to the basically limited questions involved. We will accordingly not treat in detail those general matters which appear to be essentially extraneous to the issues.

I

THE COURT BELOW DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHTS AND ITS DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT ON COMPARABLE MATTERS.

Petitioner was disbarred by the Supreme Court of Illinois for conduct inconsistent with the ethical standards of the

profession. The disbarment order was based upon Petitioner's own testimony at a criminal proceeding in the Circuit Court of Cook County, Illinois, against a former judge of that Court. Petitioner's testimony, the relevant portion of which appears in Petitioner's brief, was given after the entry of a state court order conferring a grant of immunity. The testimony documented a number of instances where Petitioner had engaged in judicial bribery. Under the terms of the operative Illinois immunity statute, Petitioner was granted immunity from any State or Federal criminal prosecution that might arise out of the use of his testimony.

Chapter 38 of the Illinois Revised Statutes provides as follows:

> "Sec. 106-1. *Granting of Immunity.* In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> Sec. 106-2. *Effect of Immunity.* Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony."

In accord with the terms of the grant of immunity, Petitioner has not been criminally prosecuted for the offenses revealed in the course of his testimony at the Kizas trial. Petitioner contends, however, that since he was disbarred by reason of that testimony, the immunity granted him was not co-extensive with his Fifth Amendment privilege of silence, since it failed to protect him from any and all ancillary consequences of his testimony. Petitioner accordingly here contends that his disbarment by the Supreme Court of Illinois was unlawful and constitutionally impermissible.

Petitioner's argument is essentially bottomed on a broad interpretation of this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511 (1967). However, when *Spevack* is properly narrowed to its precise holding and the facts underlying that case are compared to the facts in the instant case, it becomes apparent that Petitioner's broad interpretation does not serve.

Carefully read, it is clear that *Spevack* stands only for the proposition that an attorney may not be disbarred *solely* for asserting his Fifth Amendment privilege against self-incrimination in a disciplinary proceeding. Specifically, *Spevack* does *not* hold that the Fifth Amendment privilege is always available to an attorney in a disciplinary proceeding, regardless of circumstances, nor does it hold that disciplinary proceedings are to be generally considered, for constitutional purposes, as criminal proceedings. To argue either assertion, or both, as Petitioner does here before this Court is to misread *Spevack*, and to selectively ignore subsequent decisions and actions of this Court relevant to the issues in the case at bar.

The essential thrust of the Fifth Amendment privilege of silence is clear in the language of the Amendment itself:

> "No person shall . . . be compelled in any *criminal* case to be a witness against himself . . . " (emphasis supplied)

Historically, the Fifth Amendment has been one of the chief components of our bulwark of constitutional rights, and it has generally been given a broad interpretation by this Court and by various lower courts of the land in order to accomplish its high purpose. In its interpretive decisions this Court has repeatedly emphasized the Amendment's basic foundation and purpose. A recent example is this Court's decision in *Kastigar* v. *U.S.*, 406 441 (1972):

> "It (the Fifth Amendment privilege) can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; *and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to evidence that might be* so used." (emphasis supplied).

The question before the Court in the instant case does not concern the general applicability of the privilege in a variety of legal proceedings as the Petitioner would suggest; that the privilege may be asserted in other than criminal proceedings must be accepted as settled. The question, rather, is whether the privilege may be exercised where there is *no* possibility of criminal prosecution, and where the silence of the witness runs counter to a legitimate and important public interest. Recent decisions of this Court, it is respectfully suggested, establish that the answer to that question is in the negative.

In *Gardener* v. *Broderick*, 392 U.S. 273 (1967), this Court had for consideration the case of a police officer discharged from his job as a result of refusing to waive his immunity when subpoenaed before a grand jury investigating alleged corruption on the police force. In an opinion by Justice Fortas, the Court held that the officer could not be dismissed *solely* for his refusal to waive immunity. In so holding, however, the Court reiterated the propriety of compelled testimony where immunity from prosecution does exist:

> "Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the results may be self-incriminatory . . . Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

Justice Harlan, in his concurring opinion in *Gardener*, and its companion case, *Uniformed Sanitation Men's Association* v. *Commissioner of Sanitation*, 392 U.S. 287, noted with approval that the majority opinions in those cases clarified *Spevack*, and he found in the two decisions

> " . . . a procedural formula whereby . . . public officials may be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices."

Subsequent to the *Spevack* decision, the reviewing Court of the State of New York declined to follow the urgings of lawyer-respondents that the decision in *Spevack* should be interpreted as providing broad insulation for lawyers charged with professional misconduct, and this Court tacitly approved by denial of Petition For Certiorari. One such instance, *Ungar* v. *Association of the Bar of the City of New York*, 389 U.S. 1007 (1967), is of particular relevance here due to its striking similarities to the instant case. The original disciplinary action against Ungar was predicated upon testimony given by Ungar before a grand jury following a grant of immunity, and also upon a criminal contempt conviction growing out of testimony in a related proceeding. The testimony before the grand jury established Ungar's involvement in a violation of the conflict-of-interest statute, and an attempt to obstruct justice. After being disbarred, Ungar unsuccessfully sought to appeal to the New York Appeals Court, 18 N.Y. 2d 690, and then petitioned this Court for a Writ of Certiorari. The petition was denied, 385 U.S. 1006, shortly before *Spevack* was announced.

Following the *Spevack* decision, Ungar moved to vacate the order of disbarment on the grounds that *Spevack* established that the term "criminal case" as used in the Fifth Amendment encompasses any governmental act which in any sense "punishes" or affects an individual adversely,

including a disciplinary proceeding. He further contended, as petitioner Schwarz does here, that since the testimony he had given before the Grand Jury had been compelled by a grant of immunity, he had thereby been immunized from discipline for any illegal conduct disclosed in his testimony.

The Appellate Division, First Department, the New York Court having jurisdiction in disciplinary matters, denied Ungar's Motion to Vacate, holding squarely that a disciplinary proceeding was not a criminal case, and that, consequently, the grant of immunity by the Grand Jury could not immunize him from discipline. (282 N.Y.S. 2d 158) The New York Appeals Court denied Ungar's Motion for leave to appeal from the lower court's decision, and his petition for certiorari to the Supreme Court of the U.S. was denied, 389 U.S. 1007. See also, *Zuckerman vs. Greason,* 20 N.Y. 2d 430, 231 N.E. 2d 718 (Ct. of App. 1967), cert. den. 390 U. S. 925 (1968).

A somewhat comparable question was also presented to this Court in *In The Matter of Nathan Shavin, an Attorney,* Certiorari denied in 393 U.S. 1019. Shavin was suspended from the practice of law by the Illinois Supreme Court as the result of his conviction of the Federal crime of income tax evasion; *In re Shavin,* 239 N.E. 2d 790. In his Petition for a Writ of Certiorari he argued to this Court that *Spevack* had established that a disciplinary action against a lawyer was a "criminal" proceeding. On this premise he further argued that he had not been afforded the protection of the double jeopardy clause of the Fifth Amendment since both the income tax prosecution and the disciplinary proceeding were based on the same alleged acts of misconduct. This Court, as it had in Ungar, denied certiorari.

Another case of particular relevance is *Napolitano* v. *Ward,* 457 F. 2d 279, (7th Cir. Ill.), affirming 317 F. Supp. 83. Richard Napolitano, a former judge of the Circuit Court

of Cook County, Illinois, was dismissed from his office upon the basis of testimony given to a grand jury concerning corrupt business practices at the State Fair. His testimony, compelled by a grant of immunity, detailed his involvement in such practices, and he was later named as a non-indicted co-conspirator in the criminal proceedings that followed the grand jury investigation. After his dismissal from the bench in a proceeding before the Illinois Courts' Commission, Napolitano unsuccessfully appealed for reinstatement to the Illinois Supreme Court, and then appealed to this Court. In that appeal Napolitano filed a "Jurisdictional Statement" detailing the proceedings before the Courts' Commission which resulted in his removal from office, and, inter alia, he argued, as Petitioner does here, that the introduction at the disciplinary hearing of his immunized grand jury testimony had violated his Fifth Amendment privilege against self-incrimination. This Court dismissed the appeal, (*In the Matter of Napolitano,* 401 U.S. 951), for want of a substantial Federal question. (Justice Brennan would have dismissed the appeal for want of jurisdiction).

It should be noted that Napolitano's case is again pending on appeal to this Court, (No. 71-6148), this time on Petition For a Writ of Certiorari, seeking review of the decision in 457 F. 2d 279, supra.

II

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT AN IMMUNITY STATUTE AFFORD BROADER PROTECTION THAN THAT PROVIDED BY THE FIFTH AMENDMENT.

Petitioner's contention that the use of his immunized testimony in a disciplinary hearing rendered unconstitutional the statute under which the immunity was granted cannot be sustained. In *Kastigar* v. *U.S.,* 406 U.S., 441, this

Court examined a California immunity statute with regard to its constitutionality and found that

> "This statute's explicit proscription of the use in any criminal case of testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) is consonant with Fifth Amendment standards."

The Illinois statute by which Petitioner was granted immunity in exchange for his testimony likewise explicitly proscribed use of that testimony in any . . . "prosecutions against the witness for any offense shown in whole or part by such testimony or other evidence . . ." (Ill. Rev. Stat. Chapt. 38, Sec. 106-2). As previously noted, no *prosecution* against Petitioner arose out of the use of his testimony, and thus both the spirit and the letter of the law were duly recognized and faithfully fulfilled. The major point in Petitioner's argument here is, in essence, a matter of semantics involving the definition of the word punishment.

Petitioner has used a page of his brief to list cases in which the Supreme Court of Illinois has used the word "punishment" in connection with the measure of discipline being imposed upon an errant lawyer. However, as the Supreme Court of Illinois pointed out in the decision below, referring to the immunity act in question (Appendix 3a):

> "Section 106-2, however, makes it clear that the effect of an immunity order is limited to criminal prosecutions and *criminal* punishments (emphasis supplied).

Long ago the Illinois Supreme Court clearly defined the essential character and purpose of professional disciplinary proceedings when it said, in *People* v. *Meyerovitz*, 278 Ill. 356, 364 (1917) that

> "The disbarment of an attorney is not punishment for crime nor for the purpose of enforcing remedies be-

> tween parties but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts and the public. . . . When he commits an act, whether in the discharge of his duties or not, which shows such want of professional or personal honesty as renders him unworthy of public confidence it affords sufficient ground for his disbarment. It is not necessary that his misconduct should subject him to indictment, or that, if the misconduct charged amount to a crime, he should be prosecuted and convicted before disbarment. . . . A good moral character is essential to admission to the bar, and it must follow that if, after an attorney's admission, it is shown that he has forfeited or does not possess such good moral character, it is the duty of the court to revoke the authority it gave him by his admission to the bar."

In the fairly recent case of *In re Damisch*, 38 Ill. 2d 196 (230 N.E. 2d 254) the Illinois Supreme Court was asked, on the basis of *Spevack*, to alter its above-expressed view that a disciplinary proceeding is not a punishment for a crime. The Court declined to so construe *Spevack* and said that

> "Nothing in Spevack (*Spevack* v. *Klein*, 385 U.S. 511, 17 L Ed 574, 87 Sup. C. 625) has affected the continuing validity of the rule which has heretofore been adhered to in this state; a disciplinary proceeding is not a criminal prosecution and is not subject to all the rules that govern such a case. E.g. *In re Anderson*, 370 Ill. 515, 522; *In re Needham*, 364 Ill. 65, 68."

Section 106-1 read together with Section 106-2 (Chp. 38, Ill. Rev. Statutes, supra), makes it readily apparent that the immunity provided for in the statute protects against prosecution . . . "for any offense . . ." and criminal penalties resulting therefrom. Disciplinary proceedings against an attorney, instituted by the State in order to inquire into the continuing fitness of that attorney to practice law, cannot be properly construed as a criminal prosecution. Nor can

disbarment, a measure taken against an attorney in support of the undeniable public interest in maintaining high ethical standards in the legal profession, be considered a criminal penalty.

In *Reisa* v. *United States*, 364 U.S. 507 (1960), Justice Brennan wrote

> "The complete answer to this (the petitioner's argument that immunity granted him was not co-extensive with his Fifth Amendment privilege) is that in safeguarding him against future federal and state prosecution, 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker*, 161 U.S. 601 (1896) . . . compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion or elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecution."

We suggest that, in effect, petitioner Schwarz is asking for something akin to a declaration of amnesty, a generalized pardon that neither the statute in question nor the Fifth Amendment provides for or requires. By disbarring the petitioner, the State of Illinois did not in any way transgress his constitutional rights. The practice of law is a privilege, not a right, and insofar as it constitutes a privilege it demands of the lawyer a higher standard of conduct and duty than that required of an ordinary citizen.

As this Court set forth in *In re Isserman*, 345 U.S. 286-289 (1953)

> "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN CADWALADER MENK
29 South La Salle Street
Chicago, Illinois 60603

Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).